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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN LEE LOWERY,

Defendant and Appellant.

H042551 (Santa Clara County Super. Ct. No. FF932426)

The California Supreme Court transferred this case back to this court following the high court's opinion in *People v. Franco* (2018) 6 Cal.5th 433 (*Franco*). For the reasons below, we will now affirm.

Defendant Brian Lee Lowery tried to cash a stolen forged check, but the cashier determined it was forged and refused to cash it. After pleading no contest to possessing a fictitious check, Lowery petitioned to designate the offense a misdemeanor under Proposition 47. Both the prosecution and Lowery stipulated to his eligibility to have the offense designated a misdemeanor. The trial court, however, rejected this stipulation. The court denied the petition on the ground that the check was written for \$1,047.85, exceeding the \$950 limit under Penal Code section 473. Lowery appealed from the denial of his petition.

In our prior opinion in this matter, we reversed the order denying the petition on the ground that the value of the check for the purposes of a Proposition 47 petition is the

¹ Subsequent undesignated statutory references are to the Penal Code.

actual economic value of the check, not the amount written on the face of the check. In *Franco*, however, the high court disapproved our opinion and held the value of the check is determined by its face value. (*Franco*, *supra*, 6 Cal.5th at p. 438.) The court's holding in *Franco* now requires us to affirm the trial court's denial of Lowery's petition.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2009, Davlyn Giovanetti told police five checks had been stolen from her business in Morgan Hill.² Lowery tried to cash one of the checks in the amount of \$1,047 at a check cashing business in Gilroy. The cashier, however, suspected the signature was not genuine. The cashier called Giovanetti, who told him not to cash the check. The cashier kept it, along with a copy of Lowery's driver's license. Lowery subsequently told police a woman named "Ann" had given him the check as payment for collecting scrap.

In 2010, Lowery pleaded no contest to possession of a fictitious check. (§ 476.) In 2015, he petitioned to designate the offense a misdemeanor under Proposition 47. (§ 1170.18, subd. (f).) He filed a standardized court form titled "WAIVER AND STIPULATION FOR RESENTENCING or REDESIGNATION OF OFFENSES." A checked box on the form stated, "The defendant is eligible to have the felony convictions listed above be designated as misdemeanors under Penal Code §1170.18(f) and the Court may issue an order redesignating those offenses without a hearing." The form was signed under penalty of perjury by both the prosecutor and Lowery's counsel.

The trial court issued a written order setting a hearing on the petition. The order stated, "Upon review by this Court, it appears that Defendant is ineligible for the stipulated relief. Although Penal Code § 476 is an offense that may be subject to the provisions of Penal Code § 1170.18, those provisions only apply when the total amount

² The statement of facts is based on police reports summarizing the offense. At the plea hearing, Lowery stipulated to a factual basis for the offense based on the police reports. We granted his motion to augment the record with the reports.

of all checks does not exceed \$950 (see Penal Code § 476(b)).^[3] According to the statement of probable cause in this case, the check in question was in the amount of \$1047.85."

At the hearing, Lowery was represented by the public defender, but he did not personally appear. Neither defense counsel nor the prosecutor spoke. The following is the entire transcript: "[THE COURT:] Line 4 is Brian Lee Lowery. In this case, I find that defendant is ineligible for the requested relief. [¶] He is seeking reduction of the felony offense in this case in Count One. That's a violation of Penal Code Section 476. Although Penal Code Section 476[] is one of the offenses that may be subject to reduction, in this case the record clearly establishes that the check in question exceed[s] \$1,000. It was \$1,047.85. It does exceed the \$950 limit for mandatory misdemeanor treatment, and for that reason, the petition is denied."

II. DISCUSSION

In his initial appellant's brief, Lowery made three arguments that we did not directly address in our prior opinion because we resolved the matter on other grounds. Lowery now reasserts those arguments.

First, Lowery contends the trial court erred by rejecting the parties' stipulation that he was eligible for relief. He characterizes the dispute over the value of the check as a matter of fact, not law. As we noted in our prior opinion, however, the parties do not dispute the fact that the check was written in the amount of \$1,047.85. Given the parties' agreement on that fact, the issue of the value of the check under Proposition 47 becomes a question of pure law. And as Lowery concedes, a stipulation between parties does not bind a court on questions of law. (*People v. Jones* (1936) 6 Cal.2d 554, 555.)

³ The intended citation is to subdivision (b) of Penal Code section 473, not Penal Code section 476.

⁴ No "statement of probable cause" appears in the record. It appears the court relied on the police reports.

Furthermore, the high court's ruling in *Franco* is dispositive on this issue: Given that the check was written for an amount greater than \$950, Lowery was ineligible for relief under Proposition 47 as a matter of law. Accordingly, the trial court did not err by rejecting the parties' stipulation to the contrary.

Second, Lowery contends the trial court erred by relying on the police report that stated the amount written on the forged check. Lowery argues that this statement constitutes inadmissible hearsay, and he contends the trial court erred by relying on evidence outside the record of conviction. But a trial court may rely on hearsay evidence in ruling on a Proposition 47, and the court is not limited to the record of conviction. (*People v. Sledge* (2017) 7 Cal.App.5th 1089, 1096; *People v. Johnson* (2016) 1 Cal.App.5th 953, 966 (*Johnson*).) Lowery relies on this court's opinion in *People v. Burnes* (2015) 242 Cal.App.4th 1452 (*Burnes*), holding that a trial court ruling on a Proposition 36 petition may not rely on hearsay statements made in a probation report. But for the reasons set forth in *Johnson*, the holding of *Burnes* does not apply to Proposition 47 proceedings. (*Johnson, supra*, at pp. 966-968.) We conclude the trial court did not err by relying on statements in the police reports.

Third, Lowery contends his trial counsel provided ineffective assistance of counsel by failing to request an evidentiary hearing and failing to object to the trial court's reliance on the police reports. To show ineffective assistance, however, Lowery bears the burden to show any asserted deficiencies in counsel's performance resulted in prejudice. To show prejudice, Lowery must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) But here, Lowery's eligibility for relief turned entirely on the value of the forged check. And he does not point to any evidence indicating the check was valued at anything other than the amount written on it. Hence, he cannot show a reasonable probability that an evidentiary hearing would have had any effect on the outcome of the proceeding. He also does not show any reasonable

probability that the outcome of the proceeding would have been different if counsel had objected to the trial court's reliance on the police reports. For the reasons above, the trial court did not err by doing so, and an objection would have been futile. Declining to lodge a futile objection does not constitute ineffective assistance. (*People v. Anderson* (2001) 25 Cal.4th 543, 587 [defense counsel does not provide ineffective assistance of counsel by declining to lodge a futile objection].) This claim is without merit.

For the reasons above, we conclude Lowery's arguments are without merit. Accordingly, we will affirm.

III. DISPOSITION

Our prior opinion in this matter is vacated, and the order denying Lowery's Proposition 47 petition is affirmed.

	Greenwood, P.J.
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WE CONCUR:	
Grover, J.	
Danner, J.	

People v. Lowery No. H042551